



The Right-to-Know Law for Land Use Boards

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The following is a very basic summary of New Hampshire's Right-to-Know Law, RSA 91-A, as it applies to land use boards. It is not intended to address all issues that may arise under the law.

Land use board members have enough to do to understand planning and zoning issues; it is a bit much to expect them to be experts on the Right-to-Know Law as well. However, it is a good idea to have at least one member of the board who is reasonably familiar with the law, and who can keep the board on track. If there are issues that no one on the board is able to answer confidently (and correctly!), the board should consult with another local official who may have a more in-depth understanding of the law—perhaps the planning staff (if there is any), the town manager or administrator, or the municipality's legal counsel. And any board in a municipality that is a member of NHMA may contact the NHMA legal staff with questions, at no charge.

BASIC CONCEPTS. There are two basic concepts under the Right-to-Know Law. The first is that *meetings of public bodies must be open to the public*. The second is that *citizens have a right to inspect and copy governmental records*. They are simple concepts, with sometimes devilish details.

I. PUBLIC MEETINGS

WHAT IS A MEETING?

It is the convening of a quorum of a public body, “whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate contemporaneously,” for the purpose of discussing or acting upon any public business. RSA 91-A:2, I. *This includes work sessions and site walks!*

What is a *quorum*? A majority of any board or committee constitutes a quorum, unless an applicable law or rule states otherwise. RSA 21:15.

What is *not* a meeting? The law makes it clear that certain gatherings and communications are *not* meetings subject to the Right-to-Know Law (see RSA 91-A:2, I). They include:

- Strategy or negotiations relating to collective bargaining
- Consultation with legal counsel
- Legislative party caucuses

- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a public meeting (but other provisions of the law may apply—for example, the documents may be subject to disclosure).

It is important to distinguish between non-meetings (which do not exist for purposes of the Right to Know Law) and nonpublic sessions, which are meetings governed by the Right to Know Law.

WHAT IS A PUBLIC BODY?

All “public bodies” are required to have open meetings under the law. Public bodies include all municipal legislative and governing bodies and any “board, commission, committee, agency, or authority” of any municipality. Expressly included are all subcommittees, subordinate bodies, or advisory committees of such bodies. RSA 91-A:1-a, VI. Thus, *any subcommittee of a land use board is a public body and must comply in all respects with the Right to Know Law.*

On the other hand, staff meetings, department meetings, and meetings among individual officials who are not an official board, committee, commission, etc., are not “meetings.” For example, if the road agent, a planning board member and a selectman discuss something, it is not a “meeting” because that group of people has no authority to make any official decision on any matter. Similarly, if the planning department (in a municipality large enough to have a planning department) has a staff meeting, that is not a “meeting” because a group of employees is not an official public body.

WHAT NOTICE IS REQUIRED?

All meetings must have at least 24-hour notice (not counting Sundays and holidays) prior to the meeting. Notice must be either published in a newspaper or posted in two public places. RSA 91-A:2, II. Local ordinances can be more strict about notice. If so, they must be complied with. If the municipality or the public body has an Internet website, it may (but is not required to) use the website as one of the two public places for posting notice.

This 24-hour notice is only a minimum under the Right-to-Know Law. Other statutes can require more notice (especially those providing for public *hearings* on certain planning and zoning matters).

Emergencies. If a public body has an urgent need for a meeting, leaving no time to give proper notice, the 24-hour requirement is waived, but the nature of the emergency must be stated in the minutes of the meeting. Notice must still be posted as soon as practicable, and any other means that are reasonably available must be employed to inform the public about the meeting. RSA 91-A:2, II.

OPEN TO THE PUBLIC

Anyone (not just local residents) must be permitted to attend any public meeting. They may take notes, tape record, take photos, and videotape the meeting. However, “open to the public” does not mean that the Right to Know Law grants anyone the right to *speak* at the meeting. RSA Chapter 91-A ensures only a right to *attend*, not a right to *participate*.

Note that there may be reasons to allow public input at specifically designated portions of a meeting. For example, the constitutional due process right to be heard on regulations that may

affect citizens' property rights — or even the political wisdom of being sure that voters' concerns are heard and addressed — is a strong reason to allow a “public comment” period.

Public hearings are different. For many things that land use boards do—subdivision or site plan applications, variances and special exceptions, proposed zoning amendments, adoption or amendment of regulations—state law requires a public hearing. At a public hearing, certain members of the public (not necessarily everyone) *do* have a right to speak. Check the applicable statute to determine who has a right to speak at a hearing.

MINUTES OF PUBLIC MEETINGS

Minutes must be kept of all public meetings, and must be available to the public upon request within five business days after the close of the meeting. Minimum content of meeting minutes includes: (1) names of members present; (2) names other persons appearing before the board (it is not necessary to list everyone present, however); (3) a brief summary of subject matter discussed; and (4) any final decisions reached or action taken.

NONPUBLIC SESSIONS: EXCEPTIONS TO THE PUBLIC MEETING REQUIREMENT

Nonpublic sessions are meetings (or portions of meetings) that the public does *not* have the right to attend. Nonpublic sessions are allowed only for the reasons specified in RSA 91-A:3, II. A public body cannot meet in nonpublic session simply for the purpose of deliberation. All deliberations must be done in a public session unless one of the reasons for nonpublic sessions applies.

REASONS FOR NONPUBLIC SESSIONS

A public body may hold a nonpublic session only to discuss and decide certain matters identified in the statute. The ones that could conceivably be relevant to land use boards are:

1. The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against the employee, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted. RSA 91-A:3, II(a). *Notice that this section does not create a right to a meeting for an employee.* The right to a meeting must arise from some other source, such as a collective bargaining agreement, a personnel policy, or a state statute.
2. The hiring of a public employee. RSA 91-A:3, II(b). (**Note:** *Items 1 and 2 do not apply unless the board has responsibility for the employment of a public employee, such as a planning director or clerk.*)
3. Matters that, if discussed in public, would adversely affect the reputation of someone *other than a member of the public body*. However, if that person requests it, the meeting must be public. RSA 91-A:3, II(c).
4. Consideration of the acquisition, sale, or lease of real or personal property, where public discussion would benefit a party whose interests are adverse to the general public. RSA 91-A:3, II(d).

5. Consideration of lawsuits threatened in writing or filed by or against the body or one of its members. RSA 91-A:3, II(e).
6. Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present. RSA 91-A:3, II(l). *(This provision was adopted by the legislature on June 2, 2016, and has not yet been signed by the governor. It will take effect immediately when signed.)*

HOW TO ENTER NONPUBLIC SESSION

Note: See the addendum to these materials for a template you can use to ensure that your nonpublic session complies with all requirements.

1. The body must first meet in a properly noticed public meeting.
2. A motion to go into a nonpublic session must be made and seconded, stating which specific reason listed in RSA 91-A:3, II is relied upon.
3. A roll call vote must be taken, and requires the affirmative vote of the majority of members present. Only the matters specified in the motion can be discussed in the nonpublic session.

MINUTES OF NONPUBLIC SESSIONS

Minutes must be kept of the proceedings and actions of nonpublic sessions, and must contain the same information that is required for minutes of public sessions. *These minutes must be released to the public within 72 hours* (less than half the time frame for regular meetings), unless two-thirds of the members present, in a recorded vote *taken after returning to public session*, decide to seal the minutes because release of the minutes would adversely affect someone's reputation (other than a board member), or public release of the minutes public would render the action just taken ineffective (*e.g.*, consideration of the acquisition or sale of property), or the information pertains to terrorism.

Note: Effective January 1, 2017, minutes of all non-public sessions “shall record all actions in such a manner that the vote of each member is ascertained and recorded.” This does not necessarily require that the minutes show a roll call vote on all actions (although that would satisfy the requirement). If the minutes indicate that a motion was approved unanimously, that is sufficient to ascertain each member's vote. If a vote was 4-1, the minutes should indicate that and, at the least, identify the one person who voted in the negative.

REMOTE PARTICIPATION IN A PUBLIC MEETING

A public body *may*, but is *not required* to, allow one or more members to participate in a meeting by telephone or other electronic communication—but only if the member's attendance in person

is “not reasonably practical.” *See* RSA 91-A:2, III. The reason that in-person attendance is not reasonably practical must be stated in the minutes of the meeting.

Except in an emergency, at least a quorum of the public body must be physically present at the location of the meeting. An “emergency” means that “immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action.” The determination that an emergency exists is to be made by the chairman or presiding officer, and the facts upon which that determination is based must be included in the minutes.

Each part of the meeting must be audible “or otherwise discernable” to the public at the physical location of the meeting. All members of the public body must be able to hear and speak to each other simultaneously during the meeting, and must be audible or otherwise discernable to the public in attendance. **No meeting may be conducted by electronic mail** or “any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.”

All votes taken during such a meeting must be by roll call vote.

COMMUNICATIONS OUTSIDE A MEETING

RSA 91-A:2-a, limits the use of communications outside a public meeting. The bottom line is that discussion and action on official matters should occur only in a properly held meeting.

1. *No deliberations outside a public meeting.* Public bodies may deliberate on matters of official business “only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III”—*i.e.*, only in properly noticed public meetings. This does not mean that any mention of a matter of official business outside a public meeting is illegal; however, it is illegal for the body to *deliberate* on such a matter outside a meeting—*i.e.*, to discuss the matter with a view toward making a decision. *This includes discussions by e-mail!*

Note: There is an exception for those events that are exempted from the definition of a “meeting.” These include (among others) consultations with legal counsel and strategy or negotiation sessions with respect to collective bargaining.

2. *No circumvention of spirit or purpose of the law.* Communications outside a meeting, “including, but not limited to, sequential communications among members of a public body,” shall not be used “to circumvent the spirit and purpose of this chapter.” This is intended primarily to prevent public bodies from skirting the “meeting” definition by deliberating or deciding matters via a series of communications, none of which alone involves a quorum of the public body, but which in the aggregate include a quorum.

III. GOVERNMENTAL RECORDS

WHAT IS A GOVERNMENTAL RECORD?

The law defines a “governmental record” as

any *information* created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term “governmental records” includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term “governmental records” shall also include the term “public records.”

See RSA 91-A:1-a, III. The word “information,” in turn, is defined as “knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.” *See* RSA 91-A:1-a, IV.

There are several important points here:

1. *Information in physical form.* “Information” may be “written, aural, visual, [or] electronic,” but in any case must be in some *physical form*. This part of the Right to Know Law affects not *knowledge*, but *records*.
2. *Created, accepted, or obtained by a public body.* Information (such as a written communication) will constitute a governmental record when it is “created, accepted, or obtained by, or on behalf of, any public body, *or a quorum or majority thereof*, . . . in furtherance of its official function.”
3. *Created, accepted, or obtained by a public agency.* Information constitutes a governmental record if it is “created, accepted, or obtained by, or on behalf of, . . . any public agency in furtherance of its official function.” A public agency includes any agency, authority, department or office of a municipality. *See* RSA 91-A:1-a, V.
4. *In furtherance of its official function.* A governmental record is one created, accepted, or obtained by a public body or a public agency *in furtherance of its official function*. Personal correspondence, for example, is not subject to disclosure.

PUBLIC DISCLOSURE REQUIREMENT

RSA 91-A:4 governs the public disclosure and inspection of governmental records. The statute requires the following:

1. Records must be available for inspection and copying during the regular business hours of the public body or agency – unless a record is temporarily unavailable because it’s actually being used. RSA 91-A:4, IV says that when a public body or agency is not able

to make a record available for immediate inspection, it must do so within 5 business days, or deny the request with written reasons, or acknowledge the request with a statement of the time necessary to determine whether the request will be granted or denied.

2. Any citizen may make notes, tapes, photos, or photocopies of a governmental record. However, government officials should not hand over the records for copying (see RSA 41:61, which prohibits the person with custody of the records from loaning them out).

The governmental agency or official is permitted by RSA 91-A:4, IV to make copies and charge the person requesting them the “actual cost” of copying. This does not authorize charging for the cost of labor to retrieve and copy the records.

3. Governmental records maintained in electronic form may be disclosed by copying them to an electronic medium; however, if that is not reasonably practical, or if the person making the request asks for the records in a different format, the public body or agency may provide a printout of the records “or may use any other means reasonably calculated to comply with the request.” RSA 91-A:4, V. The New Hampshire Supreme Court has ruled that if a record exists in electronic format, and the person making the request wants an electronic copy and it is reasonably practical to provide one, the public body or agency does not satisfy the law by providing only a paper copy.
4. The motives of the person requesting the information are not relevant, and should not even be asked about.
5. Materials (tapes, notes, etc.) used to compile official meeting minutes are governmental records, too. These materials may be destroyed after the official minutes are prepared, but they are subject to disclosure until destroyed.
6. Records maintained in electronic form must remain accessible for the same periods as their paper counterparts. RSA 91-A:4, III-a. Retention periods for a variety of municipal records are prescribed in a separate statute, RSA chapter 33-A.

A record in electronic form is no longer subject to disclosure once it has been “initially and legally deleted.” RSA 91-A:4, III-b. A record cannot be “legally” deleted until the expiration of any statutory retention periods. An electronic record is deemed to have been “deleted” only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a “deleted items” folder or similar location on a computer does not constitute deletion.

EXEMPTIONS TO PUBLIC DISCLOSURE

RSA 91-A:5 exempts certain records from public disclosure. Among them are the records of grand and petit juries, parole and pardon boards, personal school records of students, and teacher certification records, and the following types of records that are particularly relevant to town and city governments (but many of which are not likely to be relevant to land use boards):

1. Records pertaining to internal personnel files or practices, including police and other internal investigation documents relating to public employees. This exemption has been

applied to records related to such matters as hiring and firing, work rules, and discipline. Salaries and lists of employees, however, are not exempt from disclosure.

2. Medical or welfare information, library user and videotape sale or rental records. *See* RSA 91-A:5, IV.
3. Confidential, commercial or financial information and other records whose disclosure would be an invasion of privacy. *See* RSA 91-A:5, IV. Whether a record qualifies for this exemption requires balancing the public's interest in disclosure against the government's interest in non-disclosure and the individual privacy interest that could be invaded. Any decisions about releasing information that might be subject to this exemption should be made in consultation with legal counsel.
4. Records pertaining to anti-terrorism measures. RSA 91-A:5, VI.
5. Notes or other materials made for personal use that do not have an official purpose. RSA 91-A:5, VIII.
6. Preliminary drafts, notes and memoranda, and other documents not in their final form and not disclosed, circulated or available to a quorum or a majority of a public body. RSA 91-A:5, IX.

OTHER EXEMPTIONS

Other records that are exempt from public disclosure, as determined by case law, include written legal advice, so long as it remains subject to the attorney-client privilege, and some, but not all, law enforcement files. There also are other privacy statutes that make certain information confidential and exempt from disclosure.